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Brussels, 05/03/2010, Mirjam van Reisen

Note on the legality of inclusion of aspects of EU Development Cooperation and Humanitarian Assistance in the European External Action Service (EEAS)

The Lisbon Treaty includes a provision on the new function of High Representative for Foreign Affairs and Security Policy, to be assisted by the European External Action Service (Art 27, TEU). The Lisbon Treaty defines the EEAS in its role to assist the High Representative to fulfil her mandate.

The Treaty builds on the *acquis communautaire* in defining development cooperation and humanitarian assistance under external action. This combines areas of policies defined as distinctly separate from the foreign and security policy, and includes trade.

Given that development cooperation and humanitarian assistance have been implemented by the European Commission until now, the legislator would have made an explicit specification if it had intended this *acquis communautaire* to change. However, no such specification has been provided.

While the Treaty explicitly identifies that the common foreign and security policy is implemented by the High Representative, it does not state that this is the case for development cooperation. The Treaty explicitly sets out in art 210 (TFEU) of the Treaty that "*The Commission may take any useful initiative to promote the coordination referred to in paragraph 1.*", leaving no doubt that the legislator intended the Commission to be the implementer of development cooperation policy.

The Treaty only designates a task of its implementation and the implementation of the budget accorded to the EU; nowhere does the Treaty make a distinction between "implementation" and "management" as is currently suggested in a few positions that are circulating on the issue of EEAS responsibilities. The Parliament is charged with the scrutiny of the Commission's implementation of the budget through the discharge procedure.

All aspects of development cooperation formerly under the Commission and relevant for the implementation of the budget should therefore remain under Commission authority. The Commission is explicitly identified as being in charge of the implementation of the budget (Art 17, TEU):

*The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. **It shall execute the budget and manage programmes.** It shall exercise coordinating, executive and management functions, as laid down in the Treaties. **With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union's external representation.** It shall*

initiate the Union's annual and multiannual programming with a view to achieving inter-institutional agreements.

There is no competing article that sets any doubts on the role of the Commission in this regard. The article on the establishment of the EEAS (Art 27, TEU) sets a clear mandate:

In fulfilling his mandate, the High Representative shall be assisted by a European External Action Service. This service shall work in cooperation with the diplomatic services of the Member States and shall comprise officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States. The organisation and functioning of the European External Action Service shall be established by a decision of the Council. The Council shall act on a proposal from the High Representative after consulting the European Parliament and after obtaining the consent of the Commission.

In recent papers that are circulating there are suggestions that part of the policy process on development should be managed by the EEAS. This directly contravenes the Treaty, which states that the Commission should implement the budget and the multi-annual and annual plans (Art 17, TEU):

The Commission shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Treaties. With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union's external representation. It shall initiate the Union's annual and multiannual programming with a view to achieving inter-institutional agreements.

The Lisbon Treaty defines no powers to divide development cooperation policy and humanitarian assistance between the EEAS and the Commission. Any such proposals should be regarded as illegal under the Treaty.

The Treaty does not provide for a split of responsibilities between the EEAS and the Commission, and there are no arrangements to allow a sharing of policy implementation under the Treaty.

The Treaty identifies developing countries as eligible under development cooperation, without discrimination and its implementation arrangements are therefore applicable in equal measure to all the developing countries, without distinction of sub Treaty legal instruments, such as the EDF, DCI or ENPI. The definition for developing countries is usually derived from the OECD, which provides donor coordination in the Development Assistance Committee.

In terms of ensuring that the EU's development is strengthened by the establishment of the EEAS, the EEAS should concentrate on expanding the instruments available to the European Union in diplomacy, foreign and security policy. It should concentrate on establishing regional and country specific plans for actions in these areas that complement and are consistent with the EU development cooperation, humanitarian assistance and trade policies with developing countries.

The Commission will implement these tasks in its independent quality to ensure the adherence with the Treaty.

The High Representative should strictly distinguish political leadership and representation provided in the framework of the European Union and the task to ensure consistency with the implementation of external policies by the European Commission.

Any other proposal should require a change in the Treaty, for which specific provision are available.

The Treaty extends no powers to the EEAS or the High Representative to implement stages of Development Cooperation or Humanitarian Assistance.

The European Commission, European Parliament and European Council must uphold the Treaty.

ANNEX

Article 3 (TEU – consolidated version)

5. In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, **eradication of poverty** and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

Article 11 (TEU – consolidated version)

1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.
2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.
3. **The European Commission** shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.
4. Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.

The procedures and conditions required for such a citizens' initiative shall be determined in accordance with the first paragraph of Article 21 of the Treaty on the Functioning of the European Union.

Article 15 (TEU – consolidated version)

1. The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof. It shall not exercise legislative functions.
2. The European Council shall consist of the Heads of State or Government of the Member States, together with its President and the President of the Commission. The High Representative of the Union **for Foreign Affairs and Security Policy** shall take part in its work.

Article 16 (TEU – consolidated version)

6. ...
The Foreign Affairs Council shall elaborate the Union's external action on the basis of strategic guidelines laid down by the European Council and ensure that the Union's action is consistent.

Article 17 (TEU – consolidated version)

1. The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union

law under the control of the Court of Justice of the European Union. **It shall execute the budget and manage programmes. It** shall exercise coordinating, executive and management functions, as laid down in the Treaties. **With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union's external representation.** It shall initiate the Union's annual and multiannual programming with a view to achieving interinstitutional agreements.

2. Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise. Other acts shall be adopted on the basis of a Commission proposal where the Treaties so provide.
3. The Commission's term of office shall be five years.

The members of the Commission shall be chosen on the ground of their general competence and European commitment from persons whose independence is beyond doubt.

In carrying out its responsibilities, the Commission shall be completely independent. Without prejudice to Article 9 E(2), the members of the Commission shall neither seek nor take instructions from any Government or other institution, body, office or entity. They shall refrain from any action incompatible with their duties or the performance of their tasks.

Article 18 (TEU – consolidated version)

1. The European Council, acting by a qualified majority, with the agreement of the President of the Commission, shall appoint the High Representative of the Union for **Foreign Affairs and Security Policy**. The European Council may end his term of office by the same procedure.
2. The High Representative shall **conduct the Union's common foreign and security policy**. He shall contribute by his proposals to the development of that policy, which he shall carry out as mandated by the Council. The same shall apply to the common security and defence policy.
3. The High Representative shall preside over the Foreign Affairs Council.
4. The High Representative shall be one of the Vice-Presidents of the Commission. He shall ensure the consistency of the Union's external action. He shall be responsible within the Commission for responsibilities incumbent on it in external relations and for **coordinating** other aspects of the Union's external action. In exercising these responsibilities within the Commission, and only for these responsibilities, the High Representative shall be bound by Commission procedures to the extent that this is consistent with paragraphs 2 and 3.

General Provision of the Union's External Actions

Article 21 (TEU – consolidated version)

1. The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to

in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.

2. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:

(a) safeguard its values, fundamental interests, security, independence and integrity;

(b) consolidate and support democracy, the rule of law, human rights and the principles of international law;

(c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders;

(d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;

(e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade;

(f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development;

(g) assist populations, countries and regions confronting natural or man-made disasters; and

(h) promote an international system based on stronger multilateral cooperation and good global governance.

3. The Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies.

The Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that **consistency and shall cooperate** to that effect.

Provisions for Foreign and Security Policy

Article 27 (TEU – consolidated version)

1. The High Representative of the Union for Foreign Affairs and Security Policy, who shall chair the Foreign Affairs Council, shall contribute through his proposals towards the preparation of the common foreign and security policy and shall ensure implementation of the decisions adopted by the European Council and the Council.
2. The High Representative shall represent the Union for matters relating to the common foreign and security policy. He shall conduct political dialogue with third parties on the Union's behalf and shall express the Union's position in international organisations and at international conferences.
3. In fulfilling his mandate, the High Representative shall be assisted by a European External Action Service. This service shall work in cooperation with the diplomatic services of the Member States and shall comprise officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States. The organisation and functioning of the European External Action Service shall be established by a decision of the Council. The Council shall act on a proposal from the High Representative after consulting the European Parliament and after obtaining the consent of the Commission.

Article 43 (TEU – consolidated version)

1. The tasks referred to in Article 42(1), in the course of which the Union may use civilian and military means, shall include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation. All these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories.
2. The Council shall adopt decisions relating to the tasks referred to in paragraph 1, defining their objectives and scope and the general conditions for their implementation. The High Representative of the Union for Foreign Affairs and Security Policy, acting under the authority of the Council and in close and constant contact with the Political and Security Committee, **shall ensure coordination** of the civilian and military aspects of such tasks.

Final Provisions

Article 48 (TEU – consolidated version)

1. The Treaties may be amended in accordance with an ordinary revision procedure. They may also be amended in accordance with simplified revision procedures.

Ordinary revision procedure

2. The Government of any Member State, the European Parliament or the Commission may submit to the Council proposals for the amendment of the Treaties. These proposals may, *inter alia*, serve either to increase or to reduce the competences conferred on the Union in the Treaties. These proposals shall be submitted to the European Council by the Council and the national Parliaments shall be notified.

3. If the European Council, after consulting the European Parliament and the Commission, adopts by a simple majority a decision in favour of examining the proposed amendments, the President of the European Council shall convene a Convention composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission. The European Central Bank shall also be consulted in the case of institutional changes in the monetary area. The Convention shall examine the proposals for amendments and shall adopt by consensus a recommendation to a conference of representatives of the governments of the Member States as provided for in paragraph 4.

The European Council may decide by a simple majority, after obtaining the consent of the European Parliament, not to convene a Convention should this not be justified by the extent of the proposed amendments. In the latter case, the European Council shall define the terms of reference for a conference of representatives of the governments of the Member States.

4. A conference of representatives of the governments of the Member States shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to the Treaties.

The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.

5. If, two years after the signature of a treaty amending the Treaties, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council.

Part 5 on Functioning of the EU

Title 3, Cooperation with third countries, Chapter 1, development cooperation

Article 208 (TFEU – consolidated version)

1. Union policy in the field of development cooperation shall be conducted within the framework of the principles and objectives of the Union's external action. The Union's development cooperation policy and that of the Member States complement and reinforce each other.

Union development cooperation policy shall have as its primary objective the reduction and, in the long term, the eradication of poverty. The Union shall take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries.

2. The Union and the Member States shall comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organisations.

Article 209 (TFEU – consolidated version)

1. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt the measures necessary for the implementation of

development cooperation policy, which may relate to multiannual cooperation programmes with developing countries or programmes with a thematic approach.

2. The Union may conclude with third countries and competent international organisations any agreement helping to achieve the objectives referred to in Article 21 of the Treaty on European Union and in Article 208 of this Treaty.

The first subparagraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude agreements.

3. The European Investment Bank shall contribute, under the terms laid down in its Statute, to the implementation of the measures referred to in paragraph 1.

Article 210 (TFEU – consolidated version)

1. In order to promote the complementarity and efficiency of their action, the Union and the Member States shall coordinate their policies on development cooperation and shall consult each other on their aid programmes, including in international organisations and during international conferences. They may undertake joint action. Member States shall contribute if necessary to the implementation of Union aid programmes.
2. **The Commission may take any useful initiative to promote the coordination referred to in paragraph 1.**

Article 211 (TFEU – consolidated version)

Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organisations.

Chapter 2, Economic, Financial and Technical Cooperation with third countries

Article 212 (TFEU – consolidated version)

1. Without prejudice to the other provisions of the Treaties, and in particular Articles 208 to 211, the Union shall carry out economic, financial and technical cooperation measures, including assistance, in particular financial assistance, with third countries other than developing countries. Such measures shall be consistent with the development policy of the Union and shall be carried out within the framework of the principles and objectives of its external action. The Union's operations and those of the Member States shall complement and reinforce each other.
2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt the measures necessary for the implementation of paragraph 1.
3. Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and the competent international organisations. The arrangements for Union cooperation may be the subject of agreements between the Union and the third parties concerned.

The first subparagraph shall be without prejudice to the Member States' competence to negotiate in international bodies and to conclude international agreements.

When the situation in a third country requires urgent financial assistance from the Union, the Council shall adopt the necessary decisions on a proposal from the Commission.

Chapter 3, Humanitarian Aid

Article 214 (TFEU – consolidated version)

1. The Union's operations in the field of humanitarian aid shall be conducted within the framework of the principles and objectives of the external action of the Union. Such operations shall be intended to provide ad hoc assistance and relief and protection for people in third countries who are victims of natural or man-made disasters, in order to meet the humanitarian needs resulting from these different situations. The Union's measures and those of the Member States shall complement and reinforce each other.
2. Humanitarian aid operations shall be conducted in compliance with the principles of international law and with the principles of impartiality, neutrality and non-discrimination.
3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures defining the framework within which the Union's humanitarian aid operations shall be implemented.
4. The Union may conclude with third countries and competent international organisations any agreement helping to achieve the objectives referred to in paragraph 1 and in Article 21 of the Treaty on European Union.

The first subparagraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude agreements.

5. In order to establish a framework for joint contributions from young Europeans to the humanitarian aid operations of the Union, a European Voluntary Humanitarian Aid Corps shall be set up. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall determine the rules and procedures for the operation of the Corps.
6. The Commission may take any useful initiative to promote coordination between actions of the Union and those of the Member States, in order to enhance the efficiency and complementarity of Union and national humanitarian aid measures.
7. The Union shall ensure that its humanitarian aid operations are coordinated and consistent with those of international organisations and bodies, in particular those forming part of the United Nations system.